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No. 89-1793

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In the Supreme Court of the United States

October Term, 1990

United States of America, *Petitioner*

v.

Thomas M. Gaubert, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether federal thrift officials are absolutely immune from tort liability under the "discretionary function" exception to the Federal Tort Claims Act for negligence in their extra-regulatory day-to-day management of a healthy thrift where such conduct does not require the exercise of public policy discretion.

2. Whether the Court should abstain from deciding the complex federal issue of immunity and instead affirm the court of appeals' judgment remanding this case for a determination whether the requirements of state law necessary to bring a claim under the Federal Tort Claims Act, 28 U.S.C. 1346(b), have been satisfied and, hence, to present squarely that federal question.

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BRIEF FOR RESPONDENT

For the reasons given herein, Respondent respectfully requests that the Court affirm the judgment of the court of appeals.

STATUTORY PROVISION INVOLVED

The relevant sections of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2680, are reprinted in an appendix to this brief.

COUNTER-STATEMENT OF THE CASE

The primary issue presented by the Government's brief is whether the court of appeals correctly denied the Government's motion to dismiss paragraphs 33-43 and Count II of Respondent's amended complaint for lack of

subject-matter jurisdiction. The existence of jurisdiction in this case depends entirely upon the specific and unique nature of the challenged conduct. Those paragraphs unambiguously allege that federal officials abandoned their role as regulators and negligently managed the actual day-to-day operations of Respondent's then financially-sound thrift, causing its collapse. The Government's statement and arguments dispute these allegations and assert that those officials -- acting within the customary regulatory framework -- provided nothing more than "advice" to an already failing thrift.

The Government's statement improperly recasts this case in two respects critical to its argument on the pending motion to dismiss. First, the Government's statement contends that, owing to Respondent's own management practices, his thrift was already failing before thrift officials assumed control over its day-to-day operations. *Petitioner's Brief* ("*Brief*") at 8-10. That inaccurate contention is material to the Government's claim that thrift officials made the individual management decisions challenged here "in lieu of" of instituting formal procedures (such as a conservatorship), and those decisions are therefore entitled to share in the immunity afforded a decision to pursue formal methods.[1] *Brief* at 41-45. The necessary factual predicate for that claim squarely contradicts Respondent's allegation that IASA was financially sound before the thrift officials took control of its day-to-day operations. *Joint Appendix (J.A.)* at 16, para. 35. As those officials -- on the record before the Court -- could not have instituted formal procedures, the Government's argument proceeds from a false premise.

[1] As we will demonstrate, the Government's claim to immunity for the individual day-to-day management decisions at issue here also fails for reasons apart from its reliance upon factual matters in dispute.

Second, the Government contends that the actions taken "came about in the course of regulatory activities and concerns." *Brief* at 39 n.26. The Government thereby attempts to create the inaccurate impression that this case is no different from the now common situation in which thrift officials supervise the practices of a failing institution and argues that, by permitting suit on the alleged conduct, the Court would strike at the very heart of the federal regulatory response to problems in the thrift industry. To the contrary, Respondent alleges that the thrift officials in this case *abandoned* their role as regulators and "actually substituted [their] decisions for those of the directors and officers of the association." *J.A.* at 19, para. 35. If the factual circumstances were as the Government now contends, the very agency resolution cited by the Government in support of its claim that informal methods may be employed "in lieu of" instituting formal proceedings would have prohibited the officials' assertion of control over the day-to-day operations of Respondent's thrift. *Bank Board Resolution No. 82-381 (Res. No. 82-381)* at 2 (*Appendix* at 4a-6a). If those officials had in fact acted within their customary roles, this action would not have arisen.

The Government did not introduce, nor did the trial court admit into the record, any evidence disputing Respondent's allegations.[2] Respondent objected to the

[2] The Government draws its statement primarily from selected reports and recommendations of the very agency against which Respondent has brought this suit and is, as such, largely self-serving. Further, the administrative record drawn from was compiled in 1987. As that was over a year *after* the thrift officials' mismanagement of its day-to-day operations, those reports cannot accurately describe IASA's standing before the conduct at issue here. Moreover, both here and in submitting those materials to the district court, the Government claimed they were for "Background" only. *Brief* at 39 n.26 ("We present these background matters here, as we did in the district court, simply to show that the federal 'involvement' in IASA's

(continued...)

Government's statement before both the district court and this Court. *Opp. to Mot. to Dis.*, at 2 n.1,9; *Opp. to Renewed Mot. to Dis.*, at 1-2; *Opp. to Pet. for Cert.*, at 2-3 & n.1. Neither lower court referred to, or relied upon, those extra-record representations. Accordingly, no findings of jurisdictional facts are before the Court for review and "[b]ecause the decision [the Court] review[s] adjudicated a motion to dismiss, [the Court] accept[s] all of the factual allegations in [Respondent's] complaint as true and ask[s] whether, *in these circumstances*, dismissal of the complaint [would be] appropriate." *Berkovitz* v. *United States*, 486 U.S. 531, 540 (1988) (also involving a motion to dismiss for lack of subject-matter jurisdiction) (emphasis added).

I. FACTUAL BACKGROUND

A. Respondent's Thrift Was In Sound Financial Condition Before Takeover By Federal Regulators

In 1983, Respondent acquired what became Independent American Savings Association (IASA). *J.A.* at 7, para. 6. Federal and state regulators conducted independent audits and examinations which confirmed that, through the end of 1984, IASA's assets and net worth

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[2] (...continued)
affairs alleged by respondent did not occur in a vacuum, but came about in the course of regulatory activities and concerns.") The Government's actual use of these materials belies this explanation. Rather than illuminating the context in which the federal involvement occurred, the Government improperly uses these extra-record materials to *deny* the alleged nature of that involvement. Despite Respondent's objection -- both before the district court and this Court -- to the Government's statement, the Government asserts that "[w]e do not understand respondent to dispute * * * the specific regulatory context" at issue here. *Id.* The Government finally concedes almost forty pages into its brief that the Court should disregard those materials if Respondent disputes them. *Id.* Respondent *does* dispute these extra-record materials.

grew steadily and the thrift was financially sound. *Id.* at 8, para. 8. Specifically, in December 1984, when Respondent left the thrift, IASA reported, without comment or dissent from the federal regulators, a net worth of at least $54 million. As late as 1985, shortly before the regulators took control of its day-to-day operations, the thrift was financially sound and experiencing healthy growth. *Id.* at paras 8-9.

B. Federal Regulators Require Respondent To Enter Into "Neutralization" Agreements

In 1984, officials of the Federal Home Loan Bank Board ("FHLBB") and Federal Savings and Loan Insurance Corporation ("FSLIC") were seeking to merge Investex Savings, a failing thrift, with a financially sound institution. *Id.* at 9, para. 16. Considering IASA a potential candidate, these officials approached Respondent. *Id.* at 10, para. 17. During negotiations with Respondent over the merger, the officials expressed concern about a completely unrelated loan transaction involving Respondent and an Iowa thrift. *Id.* at 9, para. 12. Rather than disapprove the Investex merger because of the unrelated Iowa loan, the officials required Respondent to sign a "Neutralization Agreement." *Id.* at 9, paras. 12-13. Under its terms, the thrift officials agreed to approve the merger provided Respondent temporarily removed himself from IASA's management during the pendency of the FHLBB's investigation of the Iowa loan. *Id.* at 9, para. 12. Federal thrift officials had never before used such an agreement, nor have they since. *Id.* at 9, para. 13.

As a condition of the merger, the officials also required Respondent -- even though prohibited from managing its operations -- to contribute capital to IASA in the form of $25 million in personal assets and to guarantee IASA's net worth. *Id.* at 9-10, paras. 14, 17. Like the rest of the agreement, the net worth guarantee

had no termination date. *Id.* at 9, para. 14. Respondent signed a second such agreement in December 1985. *Brief* at 8. At that time, IASA still had a positive net worth. *Id.* at 16, para. 35.

C. Federal Regulators Acquire Control Of IASA's Day-to-Day Management

As it turned out, the federal thrift officials forced Respondent out of his thrift at the same time it was undergoing massive growth owing to the Investex merger. Concerned about the possible detrimental effect this growth might have on IASA, these same officials -- through a two-step process -- instituted an extra-regulatory take-over of IASA, eventually substituting their decisions for those of IASA officers and directors. Again, rather than exercising formal regulatory powers -- *e.g.*, issuing a cease and desist order, appointing a conservator, or imposing a receivership -- the officials utilized unprecedented procedures.[3] *Id. at 13-16, paras. 33-34.* First, through threats and other pressure, the officials forced IASA's remaining directors and officers to resign and replaced them with their own hand-picked directors and officers. For example, IASA's new chief executive officer came from the board of the Federal Home Loan Bank of Dallas ("FHLB-Dallas") and its new chief operating officer from one of the offices in the FHLB-Dallas itself. *Id.* at 12, paras. 27, 28. Although neither had any experience in conducting the day-to-day management of a thrift, the thrift officials agreed to indemnify those individuals and the other replacement directors and officers. *Id.* at 13, para. 32.

Having placed their former associates in IASA's controlling management positions, the officials' involvement at IASA deepened to the point that they participated in, and actually directed, IASA's day-to-day technical and business operations, including:[4] negotiation

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[3] Much of the Government's argument turns upon its contention that, throughout the period in question, the thrift officials could have taken specific formal action against IASA, such as placing it into conservatorship or receivership, but rather chose to employ threats of formal action to achieve results informally. However, that argument mischaracterizes both the factual circumstances surrounding the officials' actions and the choice of procedures available to them. For example, it is inaccurate for the Government to claim that it took IASA over informally "in lieu of" placing it into receivership. Under the facts alleged -- which must be accepted as true -- IASA was sound at the time of the take-over and, therefore, the prerequisites for a conservatorship or receivership would not have been satisfied. Contrary to the Government's assertions before this Court, FHLBB manuals and resolutions permit informal procedures as a threshold step, to be taken only if the agency determines a thrift is in no serious financial trouble. *Res. No. 82-381* at 2, App. 4a-6a. Under the thrift officials' own policy and directives, "informal" methods cannot be viewed as functional equivalents of "formal" procedures. Instead, if IASA was experiencing financial problems serious enough to

(continued...)

[3] (...continued)
warrant a conservatorship or receivership, the officials could not have continued with their so-called informal suasion.

[4] Although Respondent filed this case over three years ago, he has not been permitted *any* discovery. As a result, the list of individual management decisions made by the federal thrift officials is not exhaustive, nor can it be. Once Respondent has conducted discovery, he will be able to present in full detail the day-to-day involvement of those officials. It warrants noting that in both *Dalehite* v. *United States*, 346 U.S. 15 (1953) and *United States* v. *S.A. Empresa De Viacoa Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), the Court had the benefit of an extensive trial record in addressing the complex issues raised by the Government's assertion of the discretionary function exception. Further, in *Berkovitz* v. *United States*, 486 U.S. 531, 545 (1988), the Court remanded the only claim to immunity not dependent solely upon an examination of the applicable regulations for further factual development. If the Court here should find that Respondent's allegations -- which clearly satisfy the notice pleading requirements of Fed. R. Civ. P. 8 -- leave some matters regarding the nature of the conduct at issue unanswered, the Court should follow its salutory practice in *Berkovitz* and remand the case so that Respondent will have a fair opportunity to develop the record.

of the new officers' salary and employment conditions; mediation of salary disputes; selection of financial and other consultants; conversion of IASA from a state- to a federally-chartered thrift; placement of one of IASA's subsidiaries in bankruptcy; first prohibition and then authorization for IASA to initiate certain litigation; substitution of the regulators' decisions for those of directors at IASA board meetings; and prevention of state regulatory assistance to IASA. *Id.* at 13-16, paras. 33-34. Eventually, these officials became the *de facto* decision-makers for IASA's daily operations. *Id.* at 11, para. 23.

After being at the helm of IASA for six months, the FHLB-D appointed management announced that IASA's net worth dropped from a positive $54 million to a negative net worth of over $400 million. *Id.* at 8, 16, paras. 9, 36.

II. PROCEEDINGS BELOW

A. District Court. In April 1988, Respondent brought this tort action, asserting causes of action based on the thrift officials': (1) negligent selection of IASA's replacement officers and directors; and (2) negligent management of IASA's day-to-day operations following the extra-regulatory takeover. As to both claims, Respondent alleged damages of $100 million -- $75 million for the lost value of his IASA shares and $25 million for loss of the additional capital he contributed to IASA under the net worth guarantee. The Government moved to dismiss, arguing first that only IASA itself -- not Respondent -- could assert these claims, and second that Respondent's claims fell within the "discretionary function" exception to the FTCA, 28 U.S.C. 1346(b), 2680, and were barred by sovereign immunity. *Motion to Dismiss* at 24-28. As the immunity claim depends entirely upon the conduct involved, that portion of the

Government's motion turned on the substance of Respondent's allegations.

As it has done here, the Government prepared its own factual statement that portrayed the conduct of the federal thrift officials in a manner qualitatively different from that contained in Respondent's amended complaint. *Id.* at 5-20. First, the Government disputed that IASA was financially sound before federal thrift officials became involved. Second, contending that those officials exercised only a minimum of supervision, the Government's statement disputed Respondent's allegations that thrift officials took over IASA's day-to-day operations and actually substituted their decisions for those of their hand-picked officers and directors on matters requiring only technical and business expertise. *Id.* The Government did not introduce any evidence into the record to support its version of the facts. Instead, the Government referred to portions (*viz.*, its own internal memoranda) of the administrative record underlying the FHLBB's decision to place IASA into receivership in May *1987*, well over a year *after* these officials assumed control.[5] Although the Government claimed that the "'Background' section merely describes the discretionary acts taken," it nevertheless asserted that the "Court cannot 'second guess' those actions." *Id.* at 32. It is clear that the Government in fact intended to dispute the substance of his allegations with these extra-record materials, and Respondent objected to their use. *Opp. to Mot. to Dis. at 2 n.1, 9; Opp. to Renewed Mot. to Dis. at 1-2.* The Government did not respond with a motion to introduce the materials into the record.

The Government alternatively argued that federal thrift officials are entitled to absolute immunity. *Reply*

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[5] As such, these materials reflect the financial condition of IASA *after* both the Investex merger (engineered by the federal thrift officials) and those officials' mismanagement of the thrift's day-to-day operations.

Brief at 4-6. The Government asserted that the officials' "powers permit them to forcefully involve themselves in the day-to-day operations of the associations they regulate." *Id.* at 4. "There simply is no such thing in the thrift regulatory context as a decision to regulate on the one hand and a decision to take over the management of a thrift on the other." *Id.* The Government concluded that the "discretion to regulate in this context is the discretion to do so thoroughly, even to the point of controlling and influencing the day-to-day operation of an association." *Id.* at 5 n.6. Under the Government's theory, any and all actions of agency officials ostensibly taken in respect of a thrift -- including individual management decisions following an extra-regulatory take-over -- fall within the discretionary function exception. No actions those officials might take would ever give rise to liability -- making them absolutely immune.

On September 28, 1988, the district court granted the Government's motion. Confining its attention to his amended complaint -- the only document of record -- the court accepted Respondent's factual allegations as true: "Essentially, Plaintiff argues, the Agencies went beyond their normal regulatory role by participating and becoming the *de facto* decision-makers for the operations of IASA." *Appendix to Petition for Certiorari ("Pet.App")*. at 24a. Without analyzing the nature of the individual day-to-day management decisions alleged -- the core consideration governing its application -- the court indiscriminately swept those decisions into the discretionary function exception. The court reasoned that, because the decision not to place IASA in receivership would have fallen within the exception, so too did each of the negligent management decisions. *Id.* According to the court, then, management of IASA's day-to-day operations was "an *extension* of the Agencies' discretion not to place IASA in receivership in 1984." *Id.* at 25a (emphasis added). The court, therefore, -- without

citation to *any* authority or reliance upon the principles the Court has articulated -- employed a simple expedient that effectively afforded federal regulators absolute immunity for any and all acts taken in respect of a thrift: "[A]cts taken in extension of a discretionary function fall in the safety net created by the discretionary function exception, and are not actionable." *Id.* at 26a.

B. Court of Appeals. Contrary to the indiscriminate approach of the district court, the court of appeals disposed of the case on state law grounds. Holding that "Texas law does not permit [Respondent] an individual cause of action" cognizable under the FTCA for the diminution in value of IASA shares, the court dismissed his $75 million stock claim. *Pet.App.* at 19a. The court also remanded Respondent's $25 million claim -- based on the net worth guarantee -- with instructions that the district court determine whether the thrift officials' mismanagement of IASA gave rise to a "personal cause of action." *Id.*

Going beyond the court's holding is its thorough discussion of the Court's decisions applying the "discretionary function" exception. Quoting *Varig*, the court first acknowledged that the central policy behind the exception is "Congress['s] wish[] to prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 8a-9a. Citing *Berkovitz*, the court then discussed the "two distinct strands of conduct to which the discretionary function exception does *not* apply." *Id.* at 11a. (emphasis added).

"[F]irst are cases where the official is acting pursuant to statute, and therefore has no real discretion, as her actions are pre-ordained by Congress." *Id.* at 11a-12a. Again citing *Berkovitz*, the court observed that the fact that "officials [do] not have regulations telling them at

every turn, how to accomplish their goals * * * does not automatically render their decisions discretionary and immune from FTCA suits." *Id.* at 12a. Rather, "*[o]nly policy oriented decisions enjoy such immunity.*" *Id.* (emphasis added) (citations and footnotes omitted). Hence, "the second type of conduct not encompassed by the discretionary function exception are those actions which are taken outside of the strictures of statutory or regulatory mandates," and which are not "policy oriented." *Id.*

The court then applied the *Varig/Berkovitz* principles to "the factual allegations of [Respondent's] complaint to determine at which point the federal officials lost their Sec. 2680(a) immunity."[8] *Id.* at 13a. Carefully

[8]The Government states that: the "court of appeals' key holding was that certain actions taken by federal thrift officials fell outside the * * * exception because they were *operational* in nature." *Brief* at 18 (emphasis added). It also devotes a considerable portion of its brief arguing against an "operational limitation" to the exception. *Id.* at 26-36. The Government mischaracterizes the court's analysis. The court first determined that an act did not rest upon public policy judgment -- as required by *Varig* and *Berkovitz* -- before classifying it as "operational." A court's use of the term "operational" would be objectionable only if it reflects that the court's analysis turned solely upon the *level* in the employment hierarchy occupied by the actor involved. Such an analysis would run afoul of the Court's holdings in *Varig* and *Berkovitz* that "it is the nature of the conduct, rather than the status of the actor, that governs whether the [exception] applies." *Berkovitz, 486 U.S. at 536;* Varig, 467 U.S. at 813. The court of appeals did not use the term in that sense, but employed it "as a shorthand reference to the limitation of the section 2680(a) exception to *policy* judgments -- a limitation reflected not only in *Varig*, but also in cases which preceded *Varig*, such as *Dalehite* * * * and *Indian Towing* * * * and in cases which followed it such as *Berkovitz*." *Camozzi* v. *Roland/Miller & Hope Consulting Group*, 866 F.2d 287, 291 (9th Cir. 1989) (emphasis added). In fact, every act alleged in Respondent's amended complaint occurred at the *same* employment level. For example, the same officials made the decision to replace directors and officers of IASA (a protected decision) and the decision as to the amount of their salaries (an actionable

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weighing the factual circumstances surrounding the challenged conduct of the federal thrift officials, the court observed that many allegations -- *e.g.*, merging IASA with Investex and replacing IASA's board of directors -- fell within the exception. *Id.* at 14a. The court noted, however, that the officials' actions lost their "policy oriented" character "and thus lost the protection of [sec.] 2680(a)[:]"

> when they began to advise IASA management and participate in management decisions, including hiring a consultant, directing that IASA convert to a federally-chartered entity, supervising the filing of litigation on behalf of IASA, and other allegations contained in [paras.] 33-43 of the Amended Complaint.

Id. Accordingly, the court stated that those portions of Respondent's amended complaint alleging that the officials controlled IASA's actual day-to-day operations and, therefore, Count II would be actionable if Respondent establishes a personal cause of action under Texas law.

SUMMARY OF ARGUMENT

The court of appeals correctly held federal thrift officials accountable under the FTCA for their mismanagement of IASA's day-to-day operations. The FTCA "broadly" waives the harsh judicial doctrine of sovereign immunity, providing a remedy for the negligent acts of federal officials at all levels of the

[8](...continued)
decision). Had the court actually used an operational limitation of the mechanical nature the Government now suggests it did, it could not consistently have dismissed over two-thirds of those allegations while finding the remainder actionable.

Government. Contending that this case presents a challenge to ordinary regulatory activities, the Government asserts that the mismanagement of Respondent's thrift falls within a limited exception to the FTCA, the "discretionary function" exception. Congress, however, reserved that exception for challenges to the wisdom of the public policy underlying a regulatory program, and the Court, acknowledging the limited reach of the exception, has uniformly restricted its application to conduct grounded in public policy judgment. Such *policy* judgment -- unlike the individual day-to-day management decisions at issue here -- uniquely implicates the goals and feasibility of a regulatory program or the degree to which an agency monitors efforts of private individuals to comply with federal requirements. Accordingly, the exception applies only if the suit alleges "negligence in policies or plans," and does not protect the individual acts challenged here, the alleged negligence of which exists apart from any embodiment of program directives and policies. *Dalehite* v. *United States*, 346 U.S. 15, 36-7 n.32 (1953).

The court of appeals' comprehensive analysis of Respondent's amended complaint -- the sole relevant pleading -- demonstrates that none of the predicates justifying immunity are present here. Regulations and policies did not dictate any of the challenged actions federal thrift officials took once they assumed control of IASA's day-to-day operations. The alleged actions therefore fall outside the Court's holding in *Dalehite* that the exception immunizes conduct in accordance with program directives. Nor did those regulations specifically empower individual thrift officials to exercise *public* policy judgment in making decisions as to IASA's day-to-day operations. Indeed, those officials acted outside federal regulatory policy in controlling IASA's day-to-day operations. The alleged conduct is therefore beyond the Court's decision in *Varig* that conduct grounded in an express delegation of policy-making

authority falls within the pale of the exception. The court of appeals correctly concluded that, once substituting their decisions on IASA's actual day-to-day operations for those of the thrift's directors and officers, federal officials abandoned their role as regulators and crossed the boundary marking protected from non-protected conduct.

The Government does not -- and cannot -- successfully characterize Respondent's remaining claim as a public policy challenge within the discretionary function exception. First, the Government contends that, because decisions about thrift operations involve economic *considerations*, they must also rest upon public economic *policy*. This position disregards the Court's acknowledgement in *Berkovitz* and the holdings of lower courts that conduct based upon technical and professional judgment falls outside the scope of the exception. Further, as every agency decision implicates economic considerations, this broad proposition -- also contrary to *Berkovitz* -- would make any "element of choice" the *sine qua non* of public policy judgment.

Alternatively, the Government urges the Court to adopt the district court's holding that any action taken in "extension" of a protected action is -- *necessarily* -- protected as well. Such an analysis flatly contradicts the Court's clear pronouncement that each instance of conduct must be examined independently to determine if it rests upon public policy judgment and, instead, bases application of the exception on whether the act arose in the course of a regulatory program. The Court held in *Berkovitz* -- and illustrated by reference to *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955) -- that no act warrants immunity solely by virtue of the fact that it was taken in the implementation of a protected policy decision. *Berkovitz*, 486 U.S. at 538-39. On the facts of *Indian Towing*, the discretionary function exception protected the Government's initial decision to build and maintain a lighthouse (resting upon public policy

judgment), but *not* the subsequent negligent operation of the lighthouse (resting on engineering and technical judgment).

Accepting the Government's argument would afford thrift officials *absolute* immunity, a result inconsistent with the express terms of the FTCA, its legislative history, and the Court's pronouncements. The Government's analysis provides no basis for distinguishing protected from non-protected conduct and abandons the Court's conduct-related test in favor of a mechanical test affording blanket immunity to thrift officials. That is, to dismiss the remaining Count of Respondent's amended complaint on the Government's theory, the Court must hold that, *as a matter of law*, no degree of involvement by individual federal officials in the actual running of a private business can form the basis of a negligence suit. The Court has, however, steadfastly rejected similar requests of the Government for absolute immunity. *See, e.g., Berkovitz*, 486 U.S. at 538-39 (exception does not preclude liability for "any and all acts arising out of the regulatory programs of federal agencies").

The wide-ranging latitude guaranteed thrift regulators by the court of appeals dispels the Government's suggestion that the decision might prejudice the federal regulatory response to the problems now facing the savings and loan industry. The court dismissed over two-thirds of Respondent's allegations as within the exception and has clearly protected any arguable discretionary functions involved. Moreover, the court's decision has not created, nor does it threaten to create, a flood of litigation challenging thrift regulatory decisions. The conduct challenged here is unprecedented. The only "other" case identified by the Government involves the very same S&L and the *precise* facts alleged here: only the plaintiff is different. Further, specifically recognizing the inappropriateness of many of the FHLBB's actions described in this case, Congress eliminated that agency and greatly limited the authority

of its successor. Many of the actions challenged here *cannot* occur today. Finally, because the court of appeals disposed of this case on state law grounds and the federal issue presented in this case depends upon a particular construction of state law, the Court should follow its salutory practice in similar cases and abstain from deciding the federal issue unless, and until, squarely presented.

ARGUMENT

THE NEGLIGENT MANAGEMENT OF IASA'S DAY-TO-DAY OPERATIONS FALLS OUTSIDE THE DISCRETIONARY FUNCTION EXCEPTION

A. The Discretionary Function Exception Does Not Apply To Conduct Appropriately Involving Only Business Judgment And Technical Expertise

The discretionary function exception applies only to claims that challenge the public policy underlying a regulatory program, not to claims -- such as that brought here -- alleging negligence on the part of individual government employees, where that negligence exists apart from the policies and directives of the program.

1. The FTCA Embodies A Broad Waiver Of Sovereign Immunity. The FTCA, enacted in 1946, broadly waives the Government's sovereign immunity, granting individuals a right of recovery for the torts of federal employees if a private person would be liable under similar circumstances. *See, e.g., Berkovitz*, 486 U.S. at 535 ("broad waiver"); *Indian Towing*, 350 U.S. at 68 ("designed to * * * compensate the victims of negligence in the conduct of governmental activities"), *Dalehite*, 346 U.S. at 31 ("example of the progressive relaxation * * * of the rigor of the immunity rule"). "Congress used neither intricate nor restrictive language in waiving the

Government's sovereign immunity." *United States* v. *Muniz*, 374 U.S. 150, 152 (1963). Rather, the Act plainly "provides much-needed relief to those suffering injury from the negligence of government employees." *Id.* at 165. Further, Congress intended the waiver to reach officials at all levels of the Government. "[T]he very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and *to establish novel and unprecedented governmental liability*." *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 319 (1957) (emphasis added).

The Court has also acknowledged that the FTCA "was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work," *Dalehite*, 346 U.S. at 24; and has, accordingly, understood its purpose to be "broad and just." *Indian Towing*, 350 U.S. at 68. Recognizing "the hardships caused by sovereign immunity," the Court has consistently refused "[to] narrow the remedies provided by Congress."[7] *Muniz*, 374 U.S. at 165-66; *Rayonier*, 352 U.S. at 320 ("There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.")

[7] The cases cited by the Government for a narrow reading of the FTCA either do not address that statute, *McMahon* v. *United States*, 342 U.S. 25, 27 (1951) (statute of limitations under the Suits in Admiralty Act); *Library of Congress* v. *Shaw*, 478 U.S. 310, 319 (1986) (Title VII does not separately waive federal government's traditional immunity from paying interest on damage awards); or inaccurately characterize the Court's actual holding. *United States* v. *Kubrick*, 444 U.S. 111, 117-18 (1979) ("[W]e should not take it upon ourselves to extend the waiver beyond that which Congress intended. • • • *Neither, however, should we assume the authority to narrow the waiver that Congress intended.*") (citations omitted) (emphasis added).

2. Congress Allowed Only Limited Exceptions To The Waiver Of Immunity. In enacting the FTCA, Congress provided only a very limited number of exceptions to the general waiver of sovereign immunity. Each exception (aside from the discretionary function exception) grants blanket or absolute immunity from tort liability based either on the identity of the agency or a classification of the act involved.[8] Congress also granted status-related immunity to a few federal instrumentalities whose activities affect this Nation's financial system.[9] Congress deliberately elected *not* to exempt federal regulatory agencies, including those -- such as the FHLBB -- whose activities also affect that system.

3. By Its Terms And Legislative History, The "Discretionary Function" Exception Is Limited To Conduct Grounded In Public Policy Judgment. The FTCA does not define a "discretionary function," and despite the over twenty-years of Congressional debate surrounding the FTCA, the legislative history of the exception is very scant and inconclusive. The "legislative history [does] indicate[] that while Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within the scope of

[8] The Tennessee Valley Authority and the Panama Canal Company are examples of status-dependent exemptions. *Appendix* at 1a-3a. Examples of exceptions immunizing an entire range of actions are those for claims arising out of combatant activities, the loss or negligent transfer of mail, claims arising out of the collection of tax and the detention of goods, and the imposition of a quarantine. *Id.*

[9] The FTCA excepts the Treasury (for claims arising out of its "fiscal operations"), "a Federal land bank," "a Federal intermediate credit bank," and "a bank for cooperatives." *Appendix* at 1a-3a.

[their] business, it was not contemplated that the Government should be subject to liability arising from acts of a *governmental nature or function*. Section 2680(a) draws this distinction." *Dalehite*, 346 U.S. at 27-8 (emphasis added). In short, Congress did not desire to "extend a Tort Claims Act into the realm of the validity of • • • discretionary administrative action." *Id.* at 29 (emphasis added).

Nevertheless, "the relevant legislative materials demonstrate that the exception was designed to cover *not* all acts of regulatory agencies and their employees, but only such acts as are "discretionary" in nature." *Berkovitz*, 486 U.S. at 538 (emphasis added). Congress reserved the exception for conduct so intertwined with public policy judgment that a challenge to that conduct presents a direct challenge to the program itself, as opposed to the reasonableness of the individual actor's conduct viewed apart from the goals and validity of the program. *Id.* Thus, "the common-law torts of employees of regulatory agencies would be included within the scope of the bill [*i.e.*, the FTCA] *to* the same extent as torts of nonregulatory agencies." H.R.Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945).

Accordingly, the discretionary function exception precludes only a tort suit that -- in essence -- challenges the regulatory program itself as opposed to the negligent conduct of individual government employees. Congress thereby preserved the Government's immunity for the formulation of statutory or regulatory policy. Underlying Congress' enactment of the exception, then, was the intent to protect the Government against broad-based challenges to a regulatory program, *not* a desire to deprive an injured citizen of recovery when that injury can be traced to the negligence of specific government employees. As such, the exception does not apply to conduct -- as that alleged here -- grounded in

professional and technical judgment."[19] In short, the discretionary function exception exempts the Government from liability only in circumstances in which the issue is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency. *Berkovitz*, 486 U.S. at 539; *Dalehite*, 346 U.S. at 36-7 n.32.

4. The Court Has Uniformly Restricted Application Of The Discretionary Function Exception To Public Policy Decisions. Consistent with this distinction articulated in the legislative history, the Court has uniformly limited application of the discretionary function exception to conduct grounded in public policy judgment. *See, e.g.*, *Berkovitz*, 486 U.S. at 539 ("applies only to conduct that involves the permissible exercise of policy judgment"); *Dalehite*, 346 U.S. at 28 (only those actions "of

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[19]The Court's exhaustive analysis in *Dalehite* of the legislative history underlying the exception reaches precisely that conclusion:

> This is a highly important exception intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, *where no negligence on the part of any Government agent is shown*, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid.

Dalehite, 346 U.S. at 29 n.21 (*quoting* Hearings on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., at 33) (emphasis added).

Indeed, the Ninth Circuit -- in a post-*Berkovitz* decision cited by the Government -- followed this reasoning in holding that decisions relating to the *design* of an irrigation canal fell within the exception, while decisions related to its *construction* did not. The court found the latter decisions -- even though partially involving cost considerations -- to rest upon engineering and professional judgment. *Kennewick Irrigation District* v. *United States*, 880 F.2d 1018, 1031 (9th Cir. 1989). As the court of appeals found here, this case too has the same kind of protected (what to do with IASA) and unprotected (how to actually run IASA) actions.

a *governmental* nature or function"). The exception, therefore, "'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.'" *Varig*, 467 U.S. at 808. In marking that boundary, "it is the nature of the conduct rather than the status of the actor that governs." *Id.* at 813.[11] If the manner and method of decision-making rests on technical and professional judgment -- as it does here -- the exception does not apply. *Berkovitz*, 486 U.S. at 545.

The Court first addressed the discretionary function exception in *Dalehite*, holding that conduct in conformity with program specifications and directives -- themselves clearly grounded in public policy judgment -- is immune from suit under the exception. Construing the exception to cover only conduct intertwined with the policy-making function of government, the Court observed that only "[w]here there is room for *policy* judgment and

[11]The Government ostensibly agrees with the fundamental precepts that (1) application of the exception turns upon the "nature of the conduct rather than the status of the actor;" and (2) only conduct grounded in public policy falls within the exception. *Brief* at 26. The Government, however, contradicts the facts pleaded to force the professional and business judgment at issue here under the public policy rubric and, alternatively, urges the Court to hold that any act taken in extension of a protected decision necessarily shares in that protection. In an effort to make the former argument more palatable, the Government improperly disputes Respondent's allegations that the thrift officials abandoned their role as regulators and actually substituted their decisions for those of IASA's management as to the thrift's day-to-day operations. The Government asserts that -- acting within the customary regulatory framework -- those officials merely offered advice to IASA. Either argument inevitably leads to a mechanical test that contradicts the very precepts from which the Government contends the test is derived.

decision there is discretion."[12] *Id.* at 36 (emphasis added). Accordingly, "[i]n interpreting the exceptions to the generality of the grant, courts [may] include *only those circumstances which are within the words and reason of the exception*." *Id.* (emphasis added).

Equally important, the Court articulated a principled distinction between protected and non-protected conduct that has consistently guided subsequent decisions, both of this and the lower courts. If a suit alleges "negligence in policies or plans," the exception applies and a damage suit "cannot [be] support[ed]." *Id.* at 36-7 n.32. Such a suit challenges the social and political wisdom of a "governmental function," and, if permitted, would restrict executive discretion. If, however, a suit alleges "individual acts of negligence" -- as does Respondent's claim -- where the alleged negligence is identified apart from the validity of the program itself, *id.* at 23; the exception does not apply and the FTCA provides a remedy.

The plaintiffs in *Dalehite* brought a wide-ranging challenge to a government program designed to ensure the production and shipment of fertilizer to Europe following World War II. A cabinet-level decision initiated the program, *id.* at 38; and "executives or administrators * * * establish[ed] plans, specifications [and] schedules of operations." *Id.* at 35-6.

[12]The Government suggests that this passage indicates the Court's willingness to hold that any act involving judgment based on economic *considerations* would involve *policy* judgment within the terms of the exception. *Brief* at 41. Such a reading would effectively make the exception apply to *any* act involving an element of judgment and, thereby, cause the exception to swallow the rule. The Court's analysis in *Berkovitz* makes clear that an element of judgment is a necessary but not dispositive condition for application of the exception. *Berkovitz*, 486 U.S. at 537. "The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of *public* policy."

Administrators detailed those specifications and schedules to the point of prescribing the exact temperature for bagging the fertilizer, the amount and type of additives to prevent clumping during shipment, and the manner of labelling bags of the fertilizer.[13] *Id.* at 39. Two shiploads of the fertilizer exploded during loading, destroying an entire harbor town, and causing hundreds of millions of dollars in property and personal injury damages.

"[T]he plaintiffs claimed negligence, *substantially on the part of the entire body of federal officials and employees involved in [the] program* of production of the material." *Id.* at 18 (emphasis added). The Court specifically

[13] Contrary to the Government's suggestions, this holding is inapposite to the facts presented here. The court of appeals held -- and the Government does not dispute -- that "FHLBB and FHLB-Dallas officials were not acting pursuant to statute when they acted to assume operational control of IASA" and "did not have regulations telling them at every turn, how to accomplish their goals for IASA." *Pet. App.* at 11a, 12a. The conduct challenged here did not, therefore, occur in compliance with agency directives and falls outside the holding of *Dalehite*. Nor is it surprising that applicable regulations and policy directives did not plot a course for the thrift officials' day-to-day operations of IASA. First, agency directives simply did not contemplate the take-over of a thrift's day-to-day operations outside a formal conservatorship or receivership (and the attendant protections for thrift's shareholders). *Res. No. 82-381* at 2, *Appendix* at 4a-6a. Under those directives, if a thrift's financial condition were sufficiently imperiled to warrant day-to-day intervention, thrift officials were required to seek formal remedies. Even then, in a conservatorship or receivership, thrift officials would not control the day-to-day operations of the thrift. In the former, some third party would operate the thrift. In the latter, the thrift would be liquidated or sold. Furthermore, IASA's alleged sound financial condition at the time precluded the agency from successfully seeking the institution of such formal proceedings. Indeed, the unprecedented nature of Respondent's claim arises from the fact that the thrift officials acted outside the roles prescribed by their own policies. As thrift management does not call for public policy judgment -- but rather involves the exercise of professional and business expertise -- no need existed for regulatory specifications of the type found in *Dalehite*.

observed that "*no individual acts of negligence could be shown.*" *Id.* at 23 (emphasis added). Rather, each stage of the program challenged was "performed under the direction of a plan developed at a high level under the delegation of plan-making authority * * * *." *Id.* at 40. In short, "[e]ach of these acts looked upon as negligence was directed by this Plan." *Id.* at 39. Accordingly, (and quite unlike Respondent's claims here) the plaintiffs' suit reduced to a challenge to the social wisdom of the decisions determinative of the very nature of the program itself.

Once finding the plaintiffs' claims presented no more than a challenge to the public policy choices defining the program itself, the Court easily found the conduct in question protected by the discretionary function exception. The Court first held that "the initiation of the program[]" fell within the exception. *Id.* at 36. The Court then held that the exception "also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations." *Id.* at 36 (emphasis added). The common denominator of each such protected act was "an exercise of judgment, requiring consideration of a vast spectrum of factors,[14]

[14] The Government attempts to derive from Dalehite support for its position that any decision involving cost consideration amounts to a public economic policy decision within the exception. *Brief* at 40-41. In doing so, the Government slips into the unreflective analysis it attempts to ascribe to the court of appeals -- viz., considering the *level* at which conduct occurs as the sole and dispositive factor in determining whether immunity attaches. It is true, of course, that the Court in *Dalehite* extended protection, for example, to the choice of the coating for the fertilizer. Under customary business circumstances such a "nuts-and-bolts" decision -- as the individual management decisions challenged here -- would not involve any measure of public policy judgment. The court in *Dalehite* specifically acknowledged, however, that each such "nuts-and-bolts" decision in that case was dictated by program specifications adopted by agency administrators after balancing *programatic* concerns and goals -- *viz.*,

(continued...)

including some which *touched directly [upon] the feasibility of the fertilizer program*." *Id.* at 40 (emphasis added.)

The Court addressed another claim of negligence in program policy in *Varig*, holding that the discretionary function exception permits an agency to delegate limited policy-making authority to lower-level employees without a loss of protection under the exception. Again stressing that policy-making was the touchstone of immunity, the Court reaffirmed the fundamental principles articulated in *Dalehite* governing application of the exception:

> [I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case * * * *. Thus, the basic inquiry * * * is whether the challenged acts of a Government employee -- whatever his or her rank -- are of the nature and quality that Congress intended to shield from tort liability.

Varig, 467 U.S. at 813. And again, the Court acknowledged that the underlying basis of the exception was Congress' wish to prevent "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy * * *." *Id.* at 814.

In *Varig*, the plaintiffs alleged that the FAA had negligently adopted and implemented an airworthiness compliance review process, as a result of which two

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[14] (...continued)
expeditiously providing affordable, high quality fertilizer to war-torn Europe -- and therefore reflected public policy judgment. The day-to-day management decisions Respondent challenges here are quite different. First, far from being dictated by FHLBB program specifications they occurred *outside* the permissible realm of choice afforded thrift officials by FHLBB policy directives. Second, those decisions related solely to IASA and a challenge to them in no way entails a challenge to the FHLBB regulatory program.

airplanes caught fire, killing most of the passengers. Under its regulations, the FAA does not directly test compliance with minimum safety requirements before certifying either a "design" of aircraft for production or a particular plane for service. Rather, the FAA had adopted a "spot-check" program to monitor the efforts of aircraft manufacturers to comply with such standards.

The Court first held that the establishment of the "spot-check" system fell within the discretionary function exception, because it represented a policy determination as to how "best [to] 'accomodat[e] the goal of air transportation safety and the reality of finite agency resources.'" The Court then stated that the exception also protected "the acts of FAA employees in executing the 'spot-check' program," because under that program those employees "were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources." *Id.* "Thus, the Court held the challenged acts protected from liability because they were within the range of choice accorded by federal policy and law and were the results of policy determinations."[15] *Berkovitz*, 486 U.S. at 538.

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[15] Acknowledging the breadth of the plaintiffs' challenge, the Court observed that "[w]hen an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." *Id.* at 819-20. The Government attempts to characterize the decision of thrift officials to exercise control over IASA's day-to-day management as a protected policy decision regarding the extent to which to "regulate" the thrift. The day-to-day management of a specific thrift, however, is not analogous to the programatic "compliance review" process at issue in *Varig*. *Id.* at 819. As the court of appeals concluded, the thrift officials *abandoned* their role as regulators when they assumed IASA's day-to-day management. First, FHLBB policy did not even contemplate that sort of federal involvement in a healthy thrift. *Res. No.* 82-381 at 2, Appendix at 4a-6a. The unprecedented (continued...)

The Court recognized the claim in *Varig* as a direct challenge to the political and administrative policy underlying the "spot-check" program itself, not to individual acts of negligence. In fact, the Court specifically noted that "there is no indication that either [aircraft] • • • was actually inspected or reviewed by an FAA inspector." *Varig*, 467 U.S. at 814. The Court framed the issue presented as whether "the negligent failure of the FAA to inspect certain aspects of aircraft type design *in the process of certification* gives rise to a cause of action against the United States under the Act." *Id*. at 815 (emphasis added). Distilled to its essence, then, the plaintiffs' challenge was to the "FAA's decision to certify the airplanes without first inspecting them."[16] *Berkovitz*, 486 U.S. at 537.

The Court's unanimous decision in *Berkovitz* again emphasized that "[t]he exception, properly construed, • • • protects only government actions and decisions based on considerations of *public policy*." *Berkovitz*, 486 U.S. at 537 (emphasis added). Unlike *Dalehite* and *Varig*, the claims in *Berkovitz* rested upon individual acts of negligence, not a challenge to the policy underlying the regulatory program itself. Occurring within the context of a regulatory program, those acts were taken -- as

[15] (...continued)
nature of the officials' conduct here further attests to their departure from any conduct arguably construable as "regulating" IASA. Second, *none* of the formal statutory procedures -- including a conservatorship or receivership -- actually permit thrift officials actually to operate a thrift. In no way, then, can the officials' actions in managing IASA be viewed as programatic "regulation."

[16] The proper analogy to this case would be if *Varig* involved alleged negligence in an *actual* inspection conducted under the "spot-check" program. Such a case, as the issue here, would require the Court -- as it did in *Berkovitz* (see discussion, *infra*) -- to determine whether the method and manner of inspection at issue involved the exercise of engineering and technical judgment (as it most surely would) or public policy judgment.

were the individual management decisions at issue here -- in extension of a protected discretionary decision. The Court firmly rejected, as to the FAA, the Government's argument -- now pressed on behalf of the FHLBB -- that such acts should -- for that reason -- share in the protection afforded the public policy decisions underlying the program. "In restating and clarifying the scope of the discretionary function exception, we intend specifically to reject the Government's argument • • • that the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies."[17] *Id*. at 538.

The Court articulated a two-part test for determining the applicability of the discretionary function exception to such conduct. "[A] court must first consider whether the action is a matter of choice for the acting employee[;]" "conduct cannot be discretionary unless it involves an element of judgment or choice." *Berkovitz*, 486 U.S. at 536. Second, "assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id*. That determination requires an assessment as to whether the conduct is grounded in public policy. *Id*. Accordingly, the Court required the separate analysis of *each* alleged act of negligence. The Court then cited

[17] Expanding on this holding, the Court stated:

> That argument is rebutted first by the language of the exception, which protects 'discretionary' functions, rather than 'regulatory' functions. The significance of Congress' choice of language is supported by the legislative history. As this Court previously has indicated, the relevant legislative materials demonstrate that the exception was designed to cover not all acts of regulatory agencies and their employees, but only such acts as are 'discretionary' in nature.

Berkovitz, 486 U.S. at 538-39.

its decision in *Indian Towing Co.*, 350 U.S. at 69, to illustrate this point. *Id.* at 538 n.3. That case involved an accident allegedly caused by the Coast Guard's negligent failure to maintain a lighthouse in working order. The Court held that, while the initial decision to build and maintain the lighthouse was a discretionary judgment, the failure to maintain the lighthouse did not involve a permissible exercise of policy judgment. *Indian Towing*, 350 U.S. at 69.

The Court in *Berkovitz* also expanded on the distinction drawn in *Indian Towing* between the making of a discretionary policy and its non-discretionary implementation. The Court noted that one possible claim raised in that case rested upon the allegation that government employees incorrectly determined that a vaccine satisfied applicable standards. The Court held that "the question of the applicability of the discretionary function exception requires a somewhat different analysis." "In that event, the question turns on whether the manner and method of determining compliance with the safety standards at issue *involves agency judgment of the kind protected by the discretionary function exception.*"[18] *Berkovitz*, 486 U.S. at 544-45 (emphasis added). The plaintiffs claimed that "the determination involves the application of objective scientific standards." *Id.* at 545. The Government claimed that "the determination incorporates considerable 'policy judgment.'" *Id.* The Court concluded that "the parties have framed the issue appropriately; application of the discretionary function exception • • • hinges on whether the agency officials making that determination permissibly exercise policy choice." *Id.*

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[18]The Government completely ignores this aspect of the court's holding in *Berkovitz*. *Brief* at 25.

B. The Individual Day-To-Day Management Decisions Challenged In Respondent's Amended Complaint Are Grounded In Business And Professional Expertise, Not Public Policy Judgment

Respondent unambiguously alleges that federal thrift officials negligently managed the actual day-to-day operations of IASA -- then financially sound -- and caused its collapse. The officials' extra-regulatory take-over of IASA -- largely prompted by problems those officials generated in causing the Investex merger -- occurred in two steps. First, in 1985, under threat of the net worth agreement, the officials secured Respondent's agreement permanently to relinquish his management role in IASA. Shortly thereafter, those officials -- using similar threats -- forced the resignation of IASA's directors and officers and replaced them with their own, hand-picked individuals, including a member of the board of the FHLB-Dallas and an employee of that same office. Second, the federal officials' involvement at IASA deepened until "the persons directing the management of IASA or actually managing the day-to-day operations of IASA were federal agents." *J.A.* at 6. For example, the officials negotiated the salary and employment conditions of the new directors and officers, mediated other salary disputes, selected financial and other consultants, decided whether to convert IASA from a state-to a federally-chartered thrift, determined whether and which IASA subsidiaries to place in bankruptcy, first prohibited and then authorized IASA to initiate certain litigation, and prevented state regulatory assistance to IASA. *Id.* at 15, para. 34. Moreover, the officials attended IASA board meetings, participating in and *directing* the board's decisions. *Id.* "[T]he agency actually substituted its decisions for those of the directors and officers of the association." *Id.* at 19, para. 55. In short, as the district court observed, "the Agencies went beyond their normal regulatory role by

participating and becoming the *de facto* decision-makers for the operations of IASA.'"[9] *J.A.* at 11, para. 23.

Using the two-step *Varig/Berkovitz* analysis, the court of appeals found that the federal regulators were free to choose from among alternatives in directing IASA's day-to-day operations and that these decisions did *not* rest upon public policy judgment. *Pet.App.* at 12a. The element of judgment involved in managing the day-to-day operations of a thrift is qualitatively different from the "public policy" judgment underlying the extra-regulatory take-over instituted here and that is necessary to exempt conduct from tort liability. Day-to-day thrift management requires many types of decisions, themselves drawing upon experience in a number of professional disciplines and knowledge of industry practices and standards. Many such decisions demand

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[9] In this Court, the Government disputes the substance of Respondent's allegations, contending that the thrift officials did not direct IASA's day-to-day management, but rather did nothing more than offer *advice*. The portions of Respondent's amended complaint quoted above unequivocally dispute that and allege that those officials "actually" manage[ed] the day-to-day operations of IASA." The Government also argues that the board of directors hand-picked by the thrift officials to replace IASA's own board were "managers of a private corporation following their selection [and] not subject to the 'direction' of federal regulators, only to their advice and recommendations." *Brief* at 38 n.25. Implicit in this argument is the pretense that the replacement board objectively weighed the officials' advice and independently decided upon a course of action. Respondent's allegations, of course, specifically dispute such a characterization. Moreover, the Government's argument ignores the plain fact -- acknowledged by both lower courts -- that thrift officials have considerable power over thrifts by virtue of, and through threats to exercise, their formal statutory authority. Indeed, the Government's present reluctance to concede the use made of its regulatory authority is in marked contrast to its pronouncement before *both* lower courts that "the discretion to regulate in this context is the discretion to do so thoroughly, even to the point of *controlling* and influencing the day-to-day operations of an association." *Reply To Respondent's Opp. To Mot. To Dis.*, at 5 n.6 (emphasis added.)

technical training in finance, capitalization, amortization, and property appraisals -- to name a few. Other decisions involve complicated projections and present value calculations. At times, a thrift officer must choose from among competing valuation methods in making a professional evaluation of a complex transaction. An officer must at other times gauge market trends and project interest rates and rates of return. Objective standards and prevailing industry practices aid in some decisions, while complicating others. "Thrift management judgment" is a blend of objective and subjective factors schooled by years of professional experience and developed technical expertise.

In short, the prudent management of a thrift requires business expertise and a combination of many technical skills, *not* governmental policy considerations. Similarly, the specific examples of individual management decisions alleged here are grounded in professional judgment. Decisions to manage an institution's assets, issue or call loans, raise or lower salaries, hire or dismiss consultants, and initiate litigation involve technical and business expertise and do not implicate the legislative quality of protected actions. Rather, these decisions call for the use of professional training to evaluate the most effective method for attaining results demanded in a specific situation.

The Court has consistently held that conduct grounded in this kind of technical and professional judgment falls outside the "terms and reason" of the discretionary function exception. In *Berkovitz*, the Court held that the "question turns upon the *method and manner*" in which a decision is made, and acknowledged that a "determination involv[ing] the application of objective scientific standards" for the release of vaccine falls outside the discretionary function exception. *Berkovitz*, 486 U.S. at 545. Similarly, the operation, inspection, and maintenance of a lighthouse rests upon technical and professional judgment, not the permissible exercise of public

policy judgment. *Indian Towing*, 350 U.S. at 62. The varied and complex judgments required to direct the flow, and ensure the safety, of air traffic also depend upon the exercise of professional and technical skills. *United States* v. *Union Trust Co.*, 350 U.S. 907 (1955) (summary affirmance).

The lower courts have also held that business and professional judgment are beyond the pale of the exception and restricted its application to public policy judgment. For example, "acts and omissions of [government] employees in performing • • • safety functions d[o] not involve policy judgments." *Camozzi* v. *Roland/Miller & Hope Consulting Group*, 866 F.2d 287, 292 (9th Cir. 1989); *Seyler* v. *United States*, 832 F.2d 120, 123 (9th Cir. 1987) (failure to provide adequate road signs); *see also Prescott* v. *United States*, 724 F. Supp. 792, 798 (D.Nev. 1989) (decisions involving objective standards of care for protection of health and safety in nuclear weapons testing). The negligent exercise of engineering and navigational judgment is also actionable. *See, e.g., Kennewick Irrigation District* v. *U.S.*, 880 F.2d 1018, 1031 (9th Cir. 1989) (discretion of contracting officer to determine whether certain materials are "unsuitable" for canal construction purposes based "on *technical*, *scientific*, [and] *engineering* considerations") (emphasis added); *Drake Towing Co.* v. *Meisner Marine Construction Co.*, 765 F.2d 1060, 1065 (11th Cir. 1985) (placement of directional buoys); *Eklof Marine Corp.* v. *United States*, 762 F.2d 200, 205 (2d Cir. 1985) (same). Decisions guided by industry standards and practices similarly do not rest upon public policy judgment. *See, e.g., Arizona Maintenance Co.* v. *United States*, 864 F.2d 1497, 1504 (9th Cir. 1989) (choice of whether to test soil by drilling or blasting and choice of amount of dynamite to use). Maintenance decisions also fall outside the exception. *See, e.g., ARA Leisure Services* v. *United States*, 831 F.2d 193, 196 (9th Cir. 1987)

(maintenance of roadway). The conduct alleged here is analogous to that presented in these decisions.

In fact, lower courts addressing negligence in the thrift management context have found the discretionary function exception inapplicable. For example, in *In re Franklin National Bank Securities Litigation*, 445 F. Supp. 723, 733-34 (E.D.N.Y. 1978), the court held that if the FDIC "goes beyond [its] normal regulatory activities and substitutes its decisions for those of the officers and directors" of a bank, the FDIC may be liable for those decisions. Similarly, the Seventh Circuit in *Emch* v. *United States*, 630 F.2d 523, 528-29 (7th Cir. 1980), reached the same conclusions. *see also FDIC* v. *Carter*, 701 F. Supp. 730, 737 n.17 (D.Calif. 1987) (noting agreement with holding in *Franklin National Bank*). Further, the FDIC can be held liable as receiver for negligently failing to minimize the bank's damages by employing improper loan collection procedures. *FDIC* v. *Carter*, 701 F. Supp. at 738. Likewise, the FDIC's actions when disposing of the assets of a bank "are not grounded in social or economic policy." *Id.* at 736.

The Government does not -- nor can it -- seriously develop its argument that the actual day-to-day operations of a thrift embody public policy judgment. Instead, the Government contends that, because decisions about thrift operations involve economic *considerations*, they "are clear examples of precisely the type of 'economic' judgments that the discretionary function exception protects." *Brief* at 39 and 41 ("cost considerations can amount to the sort of 'discretion' protected by the discretionary function exception"). This argument conflates the concept of economic "policy" in the sense of applying acquired knowledge and experience to the problems facing a specific *private* thrift on a day-to-day basis with that of *public* economic policy, *i.e.*, the balancing of feasiblity, costs, safety, and other factors in attaining the goals of a regulatory program. Congress reserved, and the Court has predicated application of,

the discretionary function exception upon the latter concept.[20] *Berkovitz*, 486 U.S. at 537 (exception limited to "public policy" considerations).

None of the cases relied upon by the Government supports the broad proposition necessary to its argument. For example, the Government cites *Pennbank* v. *United States*, 779 F.2d 175 (3d Cir. 1985), for the proposition that the denial of a loan is a discretionary function. In that case, however, a federal district court had enjoined further operation of the facility for which the loan was intended because of its continuing violation

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[20] The Government cites *Kennewick Irrig. Dist.* v. *United States*, 880 F.2d 1018, 1031 (9th Cir. 1989), for the proposition that the "commercial activity" of designing irrigation canals for a project falls within the discretionary function exception "principally because of the need for government decision makers to weigh the 'vital item of cost' in determining the appropriate design." *Brief* at 40. The Government does not report the court's other holding that, irrespective of the cost considerations involved, decisions critical to the construction of that same canal did not involve policy judgment and fell outside the exception. *Id.* at 1030, 32. The court reasoned that such decisions -- as do those at issue here -- rest upon professional and technical expertise. Moreover, the court decidely rejected the argument -- pressed by the Government -- that cost considerations are determinative of the nature of conduct for purposes of the exception, noting that if it were so virtually all agency actions would be protected. *Id.* at 1031.

The Government's reliance on the Court's decision in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988) for the importance of cost considerations to the applicability of the exception fares no better. The Court specifically noted that the military procurement decision in question involved "not merely engineering analysis," but balancing social considerations such as "greater safety" versus "greater combat effectiveness."

Further, the Government cites *U.S. Gold & Silver Investments, Inc.* v. *Director, U.S. Mint*, 656 F. Supp. 380 (D.Ore. 1987) for the proposition that trademark decisions are discretionary functions, but fails to note that the decision had been vacated on appeal. *U.S. Gold & Silver Investments, Inc.* v. *United States*, 885 F.2d 621, 622 (9th Cir. 1989) (vacating discretionary function exception holding on ground that FTCA does not incorporate claims for violation of Lanham Act).

of *federal environmental laws*. Further, another federal statute, 7 U.S.C. 1926(a)(10), "precluded the FmHA [*i.e.*, the agency involved] from spending money on projects which pollute the environment." *Id.* at 177 n.1. As a result, the agency's decision did not involve the exercise of discretion at all. Similarly, the plaintiff in *Williamson* v. *U.S. Dep't of Agriculture*, 815 F.2d 368 (5th Cir. 1987) was *ineligible* under the agency's objective requirements for the loan in question. The denial of the loan application, therefore, fell within the holding of *Dalehite* that conduct in conformance with agency specifications is protected. Moreover, both cases address an agency's allocation of its own funds (in accord with policies adopted by the agency), not with an agency's allocation of the funds of an entity it purports to regulate.

Moreover, even an agency's decision to allocate its own funds -- as opposed to directing the allocation of funds belonging to a private company it is ostensibly regulating -- is not *ipso facto* protected under the exception.[21] "Indeed, virtually all government actions affect costs since action itself requires resources." *Kennewick*, 880 F.2d at 1031. Accepting the Government's argument would, then, make the existence of an element of choice in agency conduct both a necessary and dispositive condition to the application of the discretionary function exception and would eviscerate the FTCA's waiver of immunity.

Apparently recognizing the insubstantiality of its factual argument, the Government alternatively argues that each individual management decision was taken in extension of the thrift officials' extra-regulatory takeover of IASA and shares in the protection afforded a decision

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[21] *See, e.g., ARA Leisure*, 831 F.2d at 195 (fact that decision-maker required to work within a budget does not make decisions regarding maintenance of park roads discretionary function); *see also Kennewick Irrigation District*, 880 F.2d at 1024 (economic *considerations* not necessarily equivalent to economic *policy*).

to have pursued formal statutory procedures instead.[22] In particular, the Government asserts:

> FHLBB's decisions to offer advice to IASA, rather than resort immediately to sterner regulatory measures, *were simply an aspect of* its highly discretionary policy-oriented judgment about 'whether and how to intervene' in that institution's affairs. Accordingly, any advice and guidance FHLBB offered to IASA must be recognized as integral to its broader regulatory activities.

Brief at 43 (citations omitted) (emphasis added.) Similarly, the Government contends that,

> because all these actions [*i.e.*, the alleged individual management decisions concerning IASA's day-to-day operations,] were taken *in lieu of pursuing more formal regulatory actions*, including receivership, federal regulators also had to consider at every juncture whether the particular

[22] The court of appeals properly rejected the Government's attempt indiscriminately to sweep any decision made in extension of a discretionary act within the exception without first determining whether that decision rested upon public policy judgment. Quoting from its decision in *Collins* v. *United States*, 783 F.2d 1225, 1233-34 (5th Cir. 1986) (Brown, concurring), the court observed:

> Every act of a rational being involves some choices -- speed up or slow down, turn right or left, put helm port or starboard, go full astern or full ahead, tighten brakes or replace them, glide in or circle, use general anesthetic or local, use a human heart or a JARVIK 7. It is plain that the discretionary function exception of [sec] 2680(a) must be applied with restraint if the Tort Claims Act is to achieve the dual purpose which motivated its enactment.

Pet. at 12a.

> actions they recommend were likely to produce beneficial results justifying the agency's continued forbearance from formal proceedings.

Id. at 44. In essence, then, the Government contends that each individual day-to-day management decision actually consisted of two components: (1) a re-affirmation of the earlier decision in favor of an extra-regulatory take-over in lieu of, for example, a conservatorship; and (2) the management decision itself. Because of the purportedly protected nature of the former element,[23] and despite the unprotected nature of the latter, each individual management decision should receive protection under the discretionary function exception.

The Government's contrived analysis flatly contradicts the Court's clear pronouncement that an act does not warrant protection under the discretionary function exception merely by virtue of the fact that it was taken in implementation of a protected policy decision. *Dalehite*, *Varig*, and *Berkovitz* presented challenges to conduct taken in extension of a protected policy decision. In each case, the Court examined the nature of the individual act *before* determining whether the act fell within the exception. In *Dalehite*, the Court held that policy directives dictated the challenged conduct, thereby making the plaintiffs' claim a direct challenge to the policy judgment underlying the program itself. The Court noted, however, that, if the claim rested upon individual acts of negligence (not to policy judgments), dismissal would have been inappropriate. The Court in

[23] Again, as explained earlier, owing to IASA's financial condition, thrift officials did not have the option of placing IASA into conservatorship or receivership. Indeed, the officials' very decision to assume control of IASA's day-to-day operations placed their conduct beyond the pale of federal regulatory policy. Once more, therefore, the Government's argument proceeds from an invalid premise.

Varig also concluded that the plaintiffs' claims challenged program policy, not individual acts of negligence.

In *Berkovitz*, the Court held that certain acts, admittedly taken in extension of a protected decision, fell outside the exception. The Court rested that holding upon a determination that, despite being an aspect of a protected decision, the challenged acts did not involve public policy judgment. The Court illustrated the point further with a citation to *Indian Towing*, observing that, while the decision to build and operate a lighthouse warranted protection, the actual operation of it -- not involving the permissible exercise of policy discretion -- did not. *Berkovitz*, 486 U.S. at 538 n.3. Lower courts have similarly determined that non-policy based acts fall outside the exception even if integral to a protected policy decision. *See, e.g., Kennewick*, 880 F.2d at 1030-32. Applying the artificial parsing of agency decision-making urged by the Government here would, as a matter of logic, require a different result in each of these cases. For example, under the Government's mechanical test the decisions resulting in the failure of the lighthouse in *Indian Towing* were as much an "aspect" of the initial decision to build and operate the lighthouse as were the individual management decisions here an aspect of the initial decision to institute an extra-regulatory take-over.

C. Dismissing Respondent's Amended Complaint Would Extend The Discretionary Function Exception Beyond The Limited Role Contemplated By Congress And Afford Thrift Officials Absolute Immunity

Reduced to its operative premise, the Government's argument asks the Court to adopt the precise axiomatic approach taken by the district court, *i.e.*, that any act -- *regardless* of whether it rests upon public policy -- taken in extension of protected act necessarily shares in

that protection. Conspicuously absent from the Government's argument is the articulation of any standard defining what conduct of thrift regulators would ever be actionable under the FTCA. Indeed, to dismiss the remaining Count of Respondent's amended complaint the Court must hold that, *as a matter of law*, no degree of involvement by individual federal officials in the actual running of an otherwise financially-sound institution can give rise to an actionable claim. The effect of such a mechanical test would be to cast indiscriminately any and all actions of the thrift officials within the pale of the discretionary function exception if such actions arguably occurred in a chain of events initiated by an action itself properly within the exception. The universe of possible regulatory activities would thereby become a *subset* of discretionary activities within the exception.[24]

The Government's claim of entitlement to absolute immunity for thrift regulators squarely contradicts the

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[24] The Government does not directly address the obvious consequence of its position. Rather, noting that the Court in *Berkovitz* rejected absolute immunity for regulatory agencies, the Government in a footnote tersely contends: "We do not make any such argument in this case." *Brief* at 25 n.15. Yet, in the lower court here, the Government was far from shy in identifying the breadth of immunity it sought:

> There simply is no such thing in the thrift regulatory context as a decision to regulate on the one hand and a decision to take over the management of a thrift on the other. Rather, there is a continuing series of discretionary decisions many of which profoundly affect the management and direction of the institution. * * * *In this area of regulation, the mandate to regulate is equal to the power to control and influence the affairs of the association regulated* * * *.

Pet. for Rehearing at 29 (emphasis added). Elsewhere the Government stated: "The discretion to regulate in this context is the discretion to do so thoroughly, *even to the point of controlling and influencing the day-to-day operation of an association*." *Id.* at 36 n.24 (emphasis added).

terms of the discretionary function exception, its legislative history and that of the FTCA, and the Court's steadfast refusal, by judicial decision, to legislate another categorical exception to the Act. Congress was deliberately parsimonious in granting categorical exemptions to the FTCA; *no* regulatory agency received such favored status. In fact, Congress rejected such an exemption for the Securities and Exchange Commission and the Federal Trade Commission. The Court has before been called upon to deny the Government's efforts to obtain a judicial amendment to the FTCA and has firmly concluded: "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." *Rayonier*, 352 U.S. at 320. Accordingly, and in recognition of the limited nature of the exception, the Court has consistently restricted its application to the permissible exercise of "public policy" judgment. *See, e.g., Berkovitz*, 486 U.S. at 537. The Court in *Berkovitz* rejected the very argument the Government presses here. *Id.* at 538.

The Government and the parties *amici* raise the specter that the court of appeals' decision will "hobble" federal efforts to address problems in the thrift industry. The wide-ranging latitude guaranteed thrift regulators by that decision dispels any such concerns. The court dismissed over two-thirds of Respondent's allegations as within the exception and has clearly protected any arguable discretionary functions involved. For example, the Government will never have to answer for the folly of merging the then sound IASA with Investex, a much larger thrift facing financial ruin.[25] Further, granting

[25] The inaccurate characterization of the "regulatory context" resulting from the Government's selective use of extra-record materials, including the Independent Counsel Report (*Harwell Report*), becomes especially clear when considering the Investex

(continued...)

thrift officials such immunity elevates them to a status more protected than that of other agencies and other branches of the Government and affords them greater protection in the exercise of their informal powers than they would have if they formally exercised their statutory authority.[26] *See FDIC* v. *Hartford Insurance Co.*, 692 F.

[25] (...continued)
merger. The Government fails to mention that "IASA • • • was considered to be a sound institution" before the merger and that "[Respondent] was not accurately informed of the intentions of the regulators at that time." *Harwell Report* at 78, 153. That is, the counsel concluded that "the prime motivation for the FHLBB in approving the transaction" was to enable "the FSLIC to avoid an immediate $40-50 million loss it would have suffered as a result of the Investex failure." *Id.* Indeed, the FHLBB staff "initially joked about the transaction," but when "informed • • • that it would potentially prevent the FSLIC fund from suffering a $40-50 million loss, the tone changed." *Id.* at 75. Moreover, "the combined effect of the neutralization agreement and the approval of the Investex • • • transaction[] was that IASA had four times as much money as it previously had to invest, while at the same time the one person who might have been able to wisely invest these funds [viz., Respondent] was removed. For these reasons, it is the opinion of Independent Counsel that at least in hindsight the neutralization agreement was not consistent with good judgment. While it was apparently entered into by the FSLIC because of the desire to save the FSLIC fund from the Investex losses [viz., "$40-50 million"], it may well be that the neutralization agreement and the events that followed [viz., the thrift officials' day-to-day management of IASA] will have exactly the opposite effect, and will cost the FSLIC far more than the losses it would have experienced solely due to the insolvency of Investex." *Harwell Report* at 78-79, 153. Therefore, although federal thrift policy required officials to prevent "potential harm to the institution," *Res. No. 82-381* at 2; it is clear that the sole purpose for the Investex merger -- as viewed by those officials bound by that Resolution -- was to save losses to the FSLIC trust fund even at an (acknowledged) "significant risk" to IASA.

[26] Granting such immunity is especially troublesome here where the officials' conduct in controlling IASA's actual day-to-day operations constituted the type of intervention that would be

(continued...)

Supp. 866 (N.D.Ill. 1988), *vacated on other grounds*, 877 F.2d 590 (7th Cir. 1989). As a result, granting absolute immunity to thrift regulators at this critical juncture would remove any incentive they might have sensibly and prudently to operate an association.

Both the Government and the parties *amici* contend that immense damage awards against the Government will arise out of the court of appeals' decision. No basis exists for such concerns. The factual circumstances surrounding Respondent's remaining claim are unique. The Government cites but one case to support its contention that the court of appeals "has opened the door to disgruntled creditors to bring suit against the United States." *Pet. Brief* at 46, n.32. The Government does not inform the Court, however, that this case is just another claim pending from the extra-regulatory take-over of *IASA*; the identical thrift and conduct at issue here. Further, although nearly a year has passed since the court's decision, Respondent could find no reported decision involving facts at all similar to those presented here or even a reference to the decision in support of an order denying a motion to dismiss under the discretionary function exception. Indeed, following the

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[26] (...continued)
warranted only if IASA were financially imperiled -- which it was not -- and which, under agency policy directives, should have been accomplished through formal means, such as a conservatorship, that brought with it certain protections for Respondent and IASA's other shareholders. *See Res. No. 82-321* at 1-2. Again, the unprecedented nature of the conduct alleged here stems directly from the fact that the officials employed procedures not contemplated by the very policy the Government cites in support of that conduct. In addition, even such formal procedures would not give the FHLBB the day-to-day control exercised here. *See* notes 13 & 18, *supra*.

passage of FIRREA, many of the actions alleged here *cannot* occur again.[27]

In enacting the FTCA, Congress was well aware that permitting suits against the Government based on the negligent acts of federal officials could impose "a heavy burden * * * on the public treasury." *Rayonier*, 352 U.S. at 319. "But after long consideration, Congress, believing it to be in the best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act." *Id.* at 319-20. Further, "Congress was aware

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[27] The Government asserts that the newly enacted "FIRREA" "place[s] the present controversy in context" and supports its assertion that the conduct of regulators in the instant case was justified. *Brief* at 4-5. To the contrary, the new legislation responds in large part to the need Congress preceived for stronger direction and greater accountability on the part of thrift regulators. In particular, Congress specifically recognized that "many of the problems facing the FSLIC and the thrift industry stem from the concentration of responsibility and authority within the FHLBB and the potential for conflicts of interest which may arise because of close ties between the Bank Board and the thrift industry." *Report 101-54 of the House Committee on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. ("*Report*") at 310. In listing the regional concentration of failed thrifts, Congress observed the highest concentration in the region under the FHLB-Dallas' control. *Report*, at 304.

Congress also expressed dissatisfaction with one regulatory practice exemplified in this case -- *i.e.*, the appointment of former FHLBB officials to the replace a thrift's officers and directors -- and stated "[t]he [current] system is rife with real and potential conflicts of interest which *compromise the integrity of the regulatory*, insurance and credit *functions* of the Federal Home Loan Bank System. This provision seeks to assure a more rational, reasonable and responsive system." Indeed, Congress specifically stated that "[t]he Committee believes that a clear separation of the credit and supervisory functions -- with clear accountability -- is better public policy." *Report*, at 453

Finally, FIRREA -- contrary to the Government's suggestion that it affords as much, if not more, latitude for thrift regulators to employ the 'informal' procedures at issue here -- reduces the arsenal of methods these regulators may use. For example, Section 902 prohibits a "temporary" cease-and-desist order of an indefinite term. Arguably, then, the "Neutralization Agreement" used here would no longer be permitted.

that when losses * * * are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government," "[b]ut when the entire burden falls on the injured party it may leave him destitute or grieviously harmed." *Id.* at 320.

D. The Court Could Alternatively Remand This Case For A Determination Whether Respondent's Remaining Claim Is Cognizable Under The FTCA

The FTCA permits suit only "where the United States, if a private person, would be liable *to the claimant* in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b) (emphasis added). Following a lengthy examination of Texas law, the court of appeals disposed of Respondent's claim of $75 million for the dimunition in the value of his IASA shares on the ground that "Texas law does not permit [Respondent] an individual cause of action." *Pet. Ap.* at 19a. The court then held that it did "not have sufficient information in the record to allow [it] to pass on whether [Respondent] has a ["personal"] cause of action" for his $25 million claim based on the net worth agreement. *Id.* Noting that "it may depend on whether there was an express or implied promise as part of the guarantee that the federal officials would not negligently cause the deterioration of the corporation," the court remanded that claim to the district court "to determine whether a valid claim is presented." *Id.* at 19a-20a.

The complex and important issue whether the discretionary function exception encompasses the negligent day-to-day management by federal thrift officials of Respondent's thrift depends, therefore, entirely upon an equally difficult issue of state law. If the district court were to find that Respondent does not have a "personal cause of action" on his remaining claim, the court of appeals' discussion of the exception will become *dicta*.

In the court below, the Government conceded the interlocutory nature of the court of appeal's discussion of the discretionary function exception, arguing in its Petition for Rehearing that the "part of the opinion which construes the FTCA's discretionary function exception should be deleted because it is *dicta* only." *Pet. for Rehearing* at 14. The Government's brief does not deny the position taken below; nor has the Government addressed the issue here.

The same can be true of a decision rendered by this Court. The discretionary function exception issue will not be squarely presented until the lower courts resolve the outstanding state law question of whether Respondent has a "valid claim." In effect, the Government's brief seeks a potentially advisory opinion from the Court. As it is the Court's practice both to defer to lower court interpretations of state law and to abstain from deciding complex federal issues dependent upon a particular construction of state law (not yet decided), the Court should affirm the court of appeals' decision remanding this case for further proceedings. Although the Government in its brief before the Court leaves this issue -- squarely raised by Respondent's opposition to the Government's petition for *certiorari* -- entirely unaddressed, the Government and both lower courts often characterize this state law issue as one of "standing." As discussed above, the issue is more accurately understood as that of whether Respondent has a cause of action that the FTCA can incorporate. Whether cast as a standing issue or a substantive law issue, the framework of the FTCA makes it a threshold issue. Disposition of the threshold issue -- perhaps obviating the need to address the far more consequential federal immunity issue -- is even more desirable in circumstances such as these where the

immunity issue is inextricably bound to the merits of Respondent's substantive allegations.[28]

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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[28] The Government's brief exemplies the problems created by addressing the immunity issue before a final determination is reached as to whether the FTCA even applies. The Government cites *U.S. Gold & Silver Investments*, 656 F. Supp. at 382, 83, for the broad proposition that the discretionary function exception precludes a FTCA challenge to trademark decisions. *Brief* at 40. The Government failed to note, however, that the Ninth Circuit *vacated* that holding on the very ground that could render the court's decision here advisory -- *viz.*, the claim asserted was not cognizable under the FTCA in the first place. *U.S. Gold & Silver Investments*, 885 F.2d at 621.

APPENDIX

A. STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b), provides in relevant part:

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. Section 2680 provides in its entirety:

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of any act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, Sec. 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

B. BANK BOARD RESOLUTION

FEDERAL HOME LOAN BANK BOARD

Resolution No. 82-381

Dated: May 26, 1982

WHEREAS, the Federal Home Loan Bank Board has considered the recommendation of the Office of Examinations and Supervision and the Office of General Counsel to adopt a formal statement of policy regarding the Bank Board's use of supervisory actions, and

WHEREAS, the adoption of such statement of policy also will implement a recommendation of the General Accounting Office for the strengthening of the Bank Board's formal supervisory process,

IT IS RESOLVED that the following statement of policy is hereby approved and adopted:

FEDERAL HOME LOAN BANK BOARD STATEMENT OF POLICY REGARDING SUPERVISORY ACTIONS

In carrying out its supervisory responsibilities with respect to thrift institutions insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"), their holding companies, service corporations, and affiliated officers and directors, it is the policy of the Federal Home Loan Bank Board that violations of law or regulation, and unsafe or unsound practices will not be tolerated and will result in the initiation of strong supervisory and/or enforcement action by the Board. It

is the Bank Board's goal to minimize, and where possible, to prevent losses occasioned by violations or unsafe and unsound practices by taking prompt and effective supervisory action. Supervisory agents and examiners should promptly identify and take action to prevent the continuation of violations or practices that may result in financial harm to the institution, its customers, or the FSLIC before such harm actually has resulted.

The Board recognizes that supervisory actions must be tailored to each case, and that such actions will vary according to the severity of the violation of law or regulation or the unsafe or unsound practice, as well as to the responsiveness and willingness of the association to take corrective action. The following guidance should be considered for all supervisory actions.

In each case, based upon an assessment of management's willingness to take appropriate corrective action and the potential harm to the institution if corrective action is not effected, the staff must weigh the appropriateness of available supervisory actions. If the potential harm is slight and there is a substantial probability that management will correct the situation, informal supervisory guidance and oversight is appropriate. If some potential harm to the institution or its customers is likely, a supervisory agreement should be promptly negotiated and implemented. If substantial financial harm may occur to the institution, its customers, or the FSLIC and there is substantial doubt that corrections will be made promptly, a cease-and-desist order should be sought immediately through the Office of General Counsel.

In those instances where substantial harm to the association, its customers, or the FSLIC is not likely, but there are continuing violations of law or regulations or

of unsafe or unsound practices, and informal supervisory actions, including the implementation of supervisory agreements, have not resulted in prompt satisfactory corrective action, or in those instances where there aresubsequent or repeated violations after informal supervisory actions have been taken, cease-and-desist actions should be pursued through the Office of General Counsel.

To expedite the implementation of appropriate cease-and-desist actions, the Bank Board, on February 18, 1982 (Resolution No. 82-99), delegated to the staff the authority to negotiate consent cease-and-desist orders, subject to final Bank Board approval.

By the Federal Home Loan Bank Board

/s/

J.J. Finn
Secretary